IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.161 OF 2006
WITH
ARBITRATION PETITION NO.307 OF 2004

Maganlal Dalichand Santokchand & Anr. ..Appellants. (Orig.Petitioners)

Vs.

Narpatraj Besarmal Mehta & Ors. ..Respondents. (Orig.Respondents)

Mr.T.G.Vora i/b.M/s.Bharat Joshi & Co. for the Appellants.

Mr.P.K.Samdhani, Senior Advocate with Mr.Chetan Kapadia i/b.M/s.Basant Tilokani & Co. for the Respondents.

CORAM : DR.S.RADHAKRISHNAN & S.J. VAZIFDAR, JJ.
DATED : 5TH MAY, 2006.

ORAL JUDGMENT : (Per S.J. Vazifdar, J.)

This is an Appeal against the order of the learned Single Judge, dismissing the petition filed by the Appellant, challenging an award dated 31.3.2004 made by the learned arbitrator.

2. By an order dated 30.9.2003, Suit No.2335 of 1994 filed by the Respondents was disposed of in terms of the minutes of the order signed by the parties and their Advocates. Clauses 1 and 6 of the minutes of

the order read as under :

> "1. By consent the pending disputes as mentioned in the above suit between the parties hereto are referred to the sole arbitration of Mr.Justice S.M. Jhunjunwala (Retd) to be conducted under the provisions of Arbitration and Conciliation Act, 1996 and the Learned Arbitrator shall pass a reasoned Award which shall be final and binding on the parties."
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> "6. The Arbitrator shall dispose off the reference within a period of 4 months from the date of entering upon the reference and the parties shall co-operate and endeavour to dispose of the reference."

3. The arbitration proceeding were conducted pursuant to the above terms. The only ground urged before us was that in view of clause 6 of the minutes of the order, the arbitrator's mandate came to an end on 30.1.2003. The Appellant's Advocate addressed a letter dated 11.3.2004 to the arbitrator contending that his mandate had come to an end and, as such, the arbitration proceedings could not continue.

4. The learned arbitrator rejected this contention by a detailed order dated 19.3.2004. The learned arbitrator thereafter made and published his award

dated 31.3.2004 on merits. As stated above, the only ground urged before us was that the arbitrator's mandate had come to an end on 30.1.2004 i.e. four months after the date of the minutes of the order dated 30.9.2004 and that therefore the award dated 31.3.2004 was passed without the arbitrator having any mandate to do so.

5. Clearly, if not admittedly, the award was made after 30.1.2004 entirely due to the Appellant's default in failing to comply with the time limits set by the Arbitrator for filing the reply and the arbitrator granting the Appellants extension of time for doing so as well as on account of the Arbitrator granting adjournments on the Appellants applications and to accommodate the Appellants. The Appellants raised this purely technical plea having taken advantage of the indulgence sought by them and granted by the learned arbitrator. The attitude of the Appellant in this regard is not entirely bona-fide or honest.

6. Mr.Vora however contended that this was a question of law and, however unfair and dishonest the Appellant's conduct may appear to be, the arbitrator's mandate having come to an end, the award

is a nullity.

7. It is necessary to note a few facts before dealing with the rival contentions. The minutes of the order dated 30.9.2003 were forwarded to the arbitrator under cover of the Respondent's Advocate's letter dated 15.10.2003. At a meeting held on 5.11.2003, directions were issued for filing a statement of claim, written statement and counter claim, if any. On 5.11.2003 the Respondents, in fact, filed a statement of claim and documents relied upon by them. The Appellants were required to file the written statement and counter-claim, if any, by 28.11.2003. By a letter dated 27.11.2003 the Appellants requested the arbitrator for time till 5.12.2003 for filing the written statement. On 5.12.2003 the Appellants again requested further time till 12.12.2003 to file the written statement. By a letter dated 12.12.2003 the Appellant's Advocates informed the arbitrator that the written statement would be filed on 13.12.2003 and sought extension accordingly. Alongwith the letter dated 13.12.2003, the Appellants filed the written statement and requested that the same be taken on record. All the aforesaid requests were granted and the written statement was taken on record.

8. By a letter dated 18.12.2003 the Appellant requested the arbitrator for an adjournment. At the meeting before the arbitrator, held on 19.12.2003, the Appellants remained absent. The learned arbitrator directed the parties to prepare the draft points for determination and adjourned the hearing to 8.1.2004. On 8.1.2004 the Respondents again remained absent. Respondent No.3 had remained present in person, but as recorded by the learned arbitrator, no claim was pressed against Respondent No.3. The hearing was therefore adjourned to 28.1.2004 to give the Appellants another opportunity to appear. In the minutes of the meeting, it was specifically provided that no further adjournment would be granted and, if the Appellants remained absent, the arbitrator would proceed in their absence. These minutes were served on the parties.

At the hearing held on 28.1.2004, the Respondents appeared before the learned arbitrator. Respondent No.3 appeared in person. A compilation of documents was tendered on behalf of the Respondents. The points for determination were finalised. The arbitrator also issued directions for filing affidavits in lieu of oral evidence. The arbitrator

fixed 24.3.2004 and 28.3.2004 as the dates for further hearing. It is important to note that the Appellant did not contend at this stage that the further hearings ought not to be fixed after 30.1.2004 as the time to make the award would by then have expired.

9. Thereafter, as stated above, the Appellants by their letter dated 11.3.2004 contended that the arbitrator's mandate had come to an end as the period of four months from 30.9.2004 had expired on 30.1.2005.

10. The learned arbitrator held that it was a settled principle of law that the date of entering upon reference is the date when the arbitrator first applies his mind to the merits of the rival contentions in the arbitral proceedings. The learned arbitrator held 28.1.2004 to be the date on which he entered upon the reference. He came to this conclusion on the basis that it was on 28.1.2004 that he first applied his mind to the rival contentions between the parties. It was on that date that the points of determination were considered and finalised.

11. The learned Single Judge upheld the above view of the learned arbitrator inter-alia on the ground that the parties relied upon the expression "entering upon reference" as defined under the Arbitration Act, 1940. Under the 1996 Act there is no time limit prescribed. The learned Judge held that it was safe to assume that while fixing the time limit for the arbitrator to make the award, the parties deliberately used the well defined term under the 1940 Act and that therefore it would constitute an agreement to the contrary, contemplated by section 21 of the 1996 Act. In this regard, the learned Judge endorsed the reliance by the learned counsel appearing on behalf of the Respondents, upon the judgment of a Division Bench of this Court in the case of *M/s.Jolly Steel Industries Pvt. Ltd., Poona v. Union of India & Anr., AIR 1979 Bombay, 214*.

12. It is important to note firstly that we are not concerned with the interpretation of a statutory provision containing the expression "date of entering upon the reference". We are concerned here with the real intention of the parties qua clause 6 of the minutes of the order. What did the parties have in mind when they agreed to clause 6 ? In other words, what was the date that the parties contemplated as

falling within the expression "date of entering upon the reference". The reliance upon the judgment in *M/s.Jolly Steel Industries*, is only an indication of how the parties may have construed the term.

13. Mr.Vora submitted that the date of communication to the Arbitrator of his appointment and his acceptance thereof is the date when he entered upon the reference.

14. The Appellant has not suggested anything regarding the intention of the parties. The burden was on the Appellant to do so.

15. The Appellant's conduct militates against Mr.Vora's submission. On 28.1.2004 the arbitrator in the presence of the parties fixed 24.3.2004 and 25.3.2004 as the next dates for the hearing of the reference. If according to the Appellants the intention of the parties was that the Arbitrator had entered upon the reference on 30.9.2003, surely they would not have agreed to the same. They, in fact, raised no objection.

16. It is also pertinent to note that clause 6 required the parties to "co-operate and endeavour to

dispose of the reference". Clearly, if not admittedly, the Appellant failed and neglected to do so. It is a moot point whether the parties intended that the one in default could urge such a contention. These are questions of fact, the burden of which was on the Appellant to prove, which they failed to do.

17. The Appellants have thus failed to establish that the arbitrator's mandate came to an end on 30.1.2004.

18. Secondly, even if the date of the arbitrator entering upon the reference is to be determined in accordance with clause 3 of Schedule I of the 1940 Act, the Appellant's case is not well founded. In fact this was the only contention urged by Mr.Vora. Schedule I, clause 3 to the Arbitration Act, 1940 reads as under :

> "*THE FIRST SCHEDULE*
> (*See section 3*)
>
> *Implied conditions of arbitration agreements*
>
> 1. .....
>
> 2. .....
>
> 3. The arbitrators shall make their award within four months after entering on the reference or after

> having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

18(a). This point is covered against the Appellant by a Division Bench judgment of this Court in *M/s.Jolly Steel Industries Pvt. Ltd., Poona v. Union of India & Anr., AIR 1979 Bombay, 214*, where it was held :

> "13. Thus, the arbitration proceeding consists of two stages. One such stage consists of merely ministerial acts while the second stage consists of effective adjudicative acts in furtherance of the work of arbitration, namely of proceedings to decide controversies in between the parties, whether arising out of the main dispute or procedural aspects in the disposal thereof. The arbitrator cannot be said to have entered on the reference unless the second stage can be said to have been reached someway of the other. Looked at from this point of view it is impossible to hold that the arbitrator had entered on reference in 17-11-1971 when nothing had happened on that date beyond the arbitrator issuing notices to the parties to file their statement of claims. The re'sume' of events in this case indicates that no effective step was taken by the arbitrator, till the hearing of the dispute commenced on 21-2-1972. Each one of the earlier stages covered merely some or the other of the ministerial acts such as issuing

> of notices, acceptance of statement of claims and adjourning the case to suit the convenience of the parties. 21st February 1972 must beheld, on the facts and in the circumstances of the case, to be the date on which the arbitrator had entered on reference. The award dated 15-5-1972 was within four months prescribed under cl. 3 of Sch. I of the Arbitration Act. In this view of the matter, the finding recorded by the learned Judge on this point is liable to be set aside."

(b). It is important to note that the Division Bench considered and construed the judgment of the Supreme Court in *AIR 1962, Supreme Court, 78* and the judgment in *Iossifoglu v. Coumantaros' (1941-1 KB 396)*. The Division Bench held that in *AIR 1962, Supreme Court, 78*, the question as to when the arbitrator enters upon the reference, had not arisen for consideration. (Probably through a typographical error, while referring to the judgment of the Supreme Court in *AIR 1962, Supreme Court, 78*, the Division Bench referred to the names of the parties in *AIR 1978, Ker. 17*, viz. *M. George v. Raju M. Mathew*. The names of the parties in *AIR 1962, Supreme Court, 78* are *Hari Shankar Lal V. Shambhu Nath & Ors.*)

(c). The Division Bench followed a Full Bench judgment of the Calcutta High Court in *Ramanath*

Agarwalla v. Goenka & Co., AIR 1973 Calcutta, 253.

Paragraph 12 of the judgment of the Division Bench of this Court reads as under :

> "12. The Full Bench of the Calcutta High Court has had occasion to consider what "entering on reference' by the arbitrator means in the case of Ramanath Agarwalla v. Goneka & Co. AIR 1973 Cal 253. After considering Sec. 3 and the several clauses of the Schedule I and Sec. 11 of the Act and different phrases employed by the legislation with regard to the stages before the arbitration, the learned Chief Justice speaking for the Court observed as follows : (para 29) :
>
> "Entering on reference, therefore, refers to the first step that the Arbitrator takes in the reference, that is to say, when he begins to deal with the reference. The Arbitrator, under the Act, may have to do various ministerial acts but the doing of any of the ministerial acts is not entering on the reference. It is only when he first applies his mind to the dispute referred to him that he enters on the reference. When, however, in a particular case, he first applied his mind to the dispute would depend in the facts and circumstances of that case."
>
> He then recorded his conclusion in para 35 of the judgment as follows:-
>
> "We therefore, answer the questions referred to us as follows :
>
> (1) An Arbitrator does not enter on the reference as soon as he assumes the office of an Arbitrator.

> An Arbitrator does not necessarily enter on the reference when he actually commences the decision of the matter in the presence of both parties or ex parte. An Arbitrator enters on a reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of each case."
>
> With respect, we find ourselves in agreement with the above observation."

19. It was admitted by Mr.Vora that if the judgment in *Jolly Steel Industries Pvt. Ltd.* is good law, the time to make and publish the award had not expired. Mr.Vora, however, submitted that the aforesaid judgments have been impliedly overruled by the judgment of the Supreme Court in *State of West Bengal v. Amritlal Chatterjee, AIR 2003, Supreme Court, 4564*. In this regard, he relied upon the following observations of the Supreme Court :

> "**11.** The said rule was enacted for a different purpose. The words employed therein are "enter on the reference". In Hari Shankar Lal v. Shambhunath Prasad and others, (1962) 2 SCR 720, whereupon Mr.Ray relied upon, a four-Judge Bench of this Court held that the words "enter on the reference" occurring in the said rule are not synonymous with the words "to act" which is more comprehensive and of a wider import."

> "**13.** The Court having regard to the duty imposed upon the arbitrator held that the arbitrators enter on the reference as soon as they have accepted their appointment and have communicated to each other about the reference. If the Arbitrator fails in his duty to enter on the reference or make a public award during the period stipulated under Rule 3 of the First Schedule indisputably a cause of action will arise for his removal or appointment of a new arbitrator in terms of Sections 11 and 12 of the 1940 Act. The words "commencement of the arbitration proceedings" have not been defined in the 1940 Act. They have to be given their ordinary meaning having regard to the provisions contained in Chapter II thereof."

Relying upon the aforesaid observations, Mr.Vora submitted that the Full Bench judgment of the Calcutta High Court and the Division Bench judgment of this Court have been impliedly overruled.

20. A careful reading of the judgment however indicates a fallacy in this submission. We have already observed that the Division Bench of this Court in *M/s.Jolly Steel Industries Pvt. Ltd., Poona v. Union of India & Anr., AIR 1979 Bombay, 214*, after considering the judgment in *AIR 1962, Supreme Court, 78* held that the Supreme Court had not considered the question as to when an arbitrator

enters upon the reference. The Division Bench expressly held that the question as to when an arbitrator enters upon the reference had not arisen for the consideration of the Supreme Court. We are bound by this finding.

21. In paragraph 13 of the judgment in *State of West Bengal v. Amritlal Chatterjee* (supra), the Supreme Court was in fact referring to the concurring judgment of Raghubar Dayal, J. in *Hari Shankar Lal V. Shambhu Nath & Ors., AIR 1962 Supreme Court, 78*, wherein, in paragraph 20, the learned Judge held as under :

> "(20) I also do not consider it necessary to decide in this case as to when arbitrators can be said to enter on the reference or what is meant by 'their being called upon to act' by notice under R.3 of the First Schedule. I simply note that I agree with the view expressed in Iossifoglu v. Coumantaros, 1941-1 KB 396 that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference. This is a stage earlier than their starting the proceedings in the presence of the parties or under some peremptory order compelling them to conclude the hearing ex parte. 'Calling upon the arbitrators to act' does include asking the arbitrators to enter on the reference, but may also include asking them to do anything in

> connection with the reference except asking them to do the routine acts connected with the enquiry."

22. In *Hari Shankar Lal's* case, Raghubar Dayal, J. was, in turn, referring to the case of *Iossifoglu v. Coumantaros, 1941-1 KB 396,* where the Court was concerned with more than one arbitrator. In that context, it was held in *Iossifoglu's* case that "arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference" (emphasis supplied). The observations clearly indicate that arbitrators enter upon a reference not merely by accepting their appointment but upon an application of mind. This is clear from the words "and have communicated with each other about the reference" and not merely as to their appointment. If Mr.Vora's contention is correct, it would have been held that arbitrators enter upon reference when they accept their appointment. This is clearly not so.

23. The judgment of the Division Bench of this Court in *M/s.Jolly Steel Industries Pvt. Ltd.* and the judgment of the Full Bench of the Calcutta High Court in *Ramanath Agarwalla v. Goenka & Co., AIR 1973 Calcutta, 253*, have not been overruled.

24. A learned Single Judge of this Court in *Dr.Babubhai Vanmalidas Mehta v. Prabhod Pranshankar Joshi, AIR 1956 Bombay, 146*, also extracted the aforesaid observations in *Iossifoglu's* case in paragraph 4. However, in paragraph 6, the learned Judge observed :

> "(6) ..... It is perhaps possible to argue that the decision in 'Iossifoglu v. Coumantaros', (A) has gone a bit too far in holding that the moment the arbitrator accepts an appointment he enters upon a reference. Perhaps the arbitrator must do some act which is referable to his position as an arbitrator and to nothing else before it can be said that he entered upon the reference; and indeed in any event, so far as Cockburn, C.J. was concerned 'Baker v. Stephens', (B) he pointed out that the arbitrator must take upon himself and exercise the functions of an arbitrator."

The learned Judge construed the judgment in *Iossifoglu's* case in the manner in which he did, probably because in paragraph 6, the learned Judge did not take into consideration the conjoint effect of both the requirements stipulated in *Iossifoglu's* case viz. the acceptance by the arbitrators of their appointment and their communication with each other

about the reference.

25. Thirdly, as held by the learned Single Judge, in any event, the view taken by the learned arbitrator that 28.1.2004 about the date on which he entered upon the reference, was a possible view on facts and in law and, therefore, interference under section 34 of the 1996 Act, was not called for. We are in respectful agreement with the learned Judge in this regard as well.

26. In the circumstances, the Appeal is dismissed.

"*THE FIRST SCHEDULE*

(*See section 3*)

Implied conditions of arbitration agreements

1 .....

2. .....

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the

reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

7. The award shall be final and binding on the parties and persons claiming under them respectively.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs, or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client."